Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 84-485

JACK D. ANDERSON,
Plaintiff and Respondent,

v.

BURLINGTON NORTHERN, INC.,
a Delaware Corporation,
Defendant and Appellant.

Appeal from the District Court of the
Eighth Judicial District, In and For the
County of Cascade

Submitted: September 20, 1985

Filed: November 26, 1985

Before: TURNAGE, Chief Justice, HARRISON, HUNT, WEBER, MORRISON and GULBRANDSON, Junior Justices, and GREEN,* District Judge.

TURNAGE, Chief Justice.

This is an appeal from the District Court's granting of partial summary judgment on liability and jury verdict on damages in a personal injury action brought pursuant to the Federal Employers' Liability Act and the Federal Boiler Inspection Act.

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* Sitting in place of Mr. Justice SHEEHY, who deems himself disqualified.

We considered the following issues on appeal:

1. Whether the District Court erred in granting respondent's motion for partial summary judgment on the violation of the Boiler Inspection Act.

2. Whether the District Court erred by improperly removing the issues of causation from the jury.

3. Whether the District Court erred in denying appellant's challenge for cause to juror Dailey.

4. Whether the District Court committed reversible error in refusing to instruct the jury regarding the nontaxability of any award made by the jury to injured railroad employee.

5. Whether the District Court erred in instructing the jury to include medical expenses incurred by respondent in its damages award even though some or all of those expenses had been covered by appellant's insurer.

6. Whether the District Court erred in adding a directed verdict for medical expenses to the jury award when the jury had been instructed to include medical expenses in its award.

We affirm the judgment of the District Court on all issues except the sixth. We reverse the District Court's directed verdict which added $11,795.25 to the jury verdict.

Respondent, Jack D. Anderson, was a locomotive engineer employed by the appellant, Burlington Northern Railroad Company (BN), working on a train assigned to snowplow service north and west of Saco, Montana. During a lull in the operations, respondent entered a toilet compartment at the rear of the locomotive. The toilet compartment is a small room about six feet wide by seven feet long used for storage of tools and equipment as well as providing toilet facilities for the crew. The compartment is dimly lit.

Respondent claims that as he walked into the compartment, he tripped and stumbled head-on into the sandbrum on the opposite wall of the compartment. Without looking to see what may have caused his fall, respondent left the compartment and informed other crew members of the accident. The other crew members then checked the compartment and found a pilot, an iron skirt which serves as a cow catcher, on the floor of the compartment. Apparently, the pilot had been recently stored out-of-the-way in the compartment. The jerking from the snow-plowing operation jarred the pilot out to a point in front of the compartment entrance where respondent tripped.

As a result of the accident, respondent suffered from neck pain. He sought treatment from an orthopedic surgeon, Thomas Power, M.D., in Great Falls. A cervical sprain was diagnosed, and respondent was treated with rest, traction and physical therapy. Respondent continued to suffer from neck pain and went to an orthopedic surgeon in San Francisco, Arthur White, M.D. Dr. White diagnosed the injury as a herniated disc and performed a cervical fusion on August 1, 1978. The surgery relieved respondent's pain for awhile. However, the pain resumed and rendered the respondent incapable of working.

Respondent then brought this action in the Eighth Judicial District to recover damages for personal injuries sustained within the scope of his employment as a locomotive engineer for BN.

In the meantime, BN's insurer had paid respondent's medical expenses in accordance with a collective bargaining agreement. Respondent filed a motion in limine to prevent any mention of appellant's payment of the medical expenses during trial. Respondent maintained that the insured's payment of the medical expenses was a collateral source of no benefit to appellant. The District Court agreed and granted respondent's motion and directed a verdict in favor of respondent on his claim

for medical expenses. The District Court also granted respondent's motion for partial summary judgment holding that the pilot on the floor of the toilet compartment constituted a violation of the Boiler Inspection Act for which defendant was strictly liable. The issues of causation and damages were submitted to the jury. The jury returned a verdict for damages of $195,000 to which the directed verdict of $11,795.25 for medical expenses was added for a total judgment of $206,795.25. BN appeals that judgment.

Respondent's action is based upon violation by BN of two federal statutes known as the Boiler Inspection Act, 45 U.S.C. § 22 et seq., (a portion of the Safety Appliance Act) and the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 et seq. In particular, 45 U.S.C. § 23 provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate . . . that the same may be employed in the active service of such carrier without unnecessary peril to life or limb . . .

In *Callihan v. Burlington Northern, Inc.* (Mont. 1982), 654 P.2d 972, 975, 39 St.Rep. 2158, we followed the United States Supreme Court decision in *Lilly v. Grand Trunk R. Co.* (1943), 317 U.S. 481, 485, 63 S.Ct. 347, 87 L.Ed. 411, in holding that this section interacts with the FELA to impose absolute liability on anyone that violates it. *Callihan*, 654 P.2d at 975, also determined that recovery for a Boiler Inspection Act violation requires a showing of: (1) a violation of the Act, and (2) injury proximately caused by that violation.

I

Appellant here claims that whether or not the piece of pilot on the floor violated the Boiler Inspection Act was

a question of fact for the jury and that it was error for the District Court to grant summary judgment on that issue. A large iron object on the floor of a dimly lit walkway in a moving locomotive seems to us to involve "unnecessary peril to life or limb" so as to violate the Act, but without more this would be a conclusion for the jury to make. However, in this case we are not left to our own resources in construing the Act. The Federal Railroad Administration, Department of Transportation, has set the standard by imposing the following railroad locomotive safety regulation:

> Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.

49 C.F.R. § 229.119(c).

There is uncontroverted evidence that there was a pilot in the walkway in violation of this rule. In *Lilly*, 317 U.S. at 488, 63 S.Ct. at 352, the United States Supreme Court, when faced with a similar rule, held that a rule adopted in exercise of the Interstate Commerce Commission's authority to set standards of compliance with the Boiler Inspection Act acquires the force of the law and becomes an integral part of the Act. Because the Federal Railroad Administration has taken over the functions of the Interstate Commerce Commission with respect to railroad safety, 49 U.S.C. § 1655(e) and (f), this holding is directly applicable to the instant case. BN, by violating a rule that was adopted in exercise of the Federal Railroad Administration's authority to set standards of compliance with the Boiler Inspection Act, has also violated the Act.

Appellant questions whether this rule was properly before the District Court. However, the rule was referred to in depositions presented with the motion for

summary judgment. Moreover, in *Lilly*, supra, the federal rule had not been called to the attention of the trial court. The Supreme Court held that it will take judicial notice of federal rules setting standards of compliance with the Boiler Inspection Act. *Lilly*, 317 U.S. at 488, 63 S.Ct. at 352. We will not ignore the federal rule now.

Even if there was no violation of the Act as a matter of law because of the federal regulation, the District Court could have found the violation issue proper for summary judgment because of BN's own safety rule No. 112 which was before the court. Rule No. 112 provides:

> To avoid stumbling, tripping, and falling, floors, gangways and steps of locomotives must be kept free of supplies, tools, and loose equipment.

Such a safety rule is strong evidence that a violation of that rule would present "unnecessary peril to life and limb." Because appellant has provided nothing to counter this evidence of a Boiler Inspection Act violation, summary judgment was appropriate.

II

The second prong of our test for recovery under the Boiler Inspection Act is whether the violation of the Act proximately caused plaintiff's injury. *Callihan*, supra. BN argues that the District Court failed to properly consider the issue of causation. We disagree.

By granting summary judgment on liability, the District Court took the issue of whether BN's violation of the Boiler Inspection Act caused the accident from the jury. Appellant, however, claims that there was insufficient evidence to establish the cause of respondent's accident because respondent did not see what he tripped over and the other witnesses did not see the accident. Appellant then speculates that respondent may have tripped over something besides the pilot. However, we

follow the rule that inferences drawn from circumstantial evidence can be as probative as direct evidence. *Barich v. Ottenstror* (1976), 170 Mont. 38, 42, 550 P.2d 395, 397. Furthermore, the party opposing a motion for summary judgment on a record which reveals no issue of material fact must present facts of substantial nature, and conclusionary or speculative statements are insufficient to raise genuine issues of material fact. *Barich*, supra; Rule 56, M.R.Civ.P.

The depositions establish that respondent went into the toilet compartment and fell, hurting his head and shin. Respondent's co-workers saw him enter the compartment, heard a "thump" and a shout, saw respondent come out of the compartment, listened to respondent's immediate complaints, and immediately investigated the compartment where they found the pilot near the door. The obvious inference from this evidence is that respondent tripped over the pilot. Appellant only speculates that something else caused the accident. As such, the trial court was entitled to conclude that BN's violation of the Boiler Inspection Act in not keeping a walkway free of obstructions caused the accident.

Appellant also argues that the jury was improperly instructed on the issue of causation. The same argument that the jury failed to consider causation under similar facts to the instant case was considered by this Court in *Callihan*, supra. In *Callihan*, plaintiff injured his back when the seat he was sitting on in a BN locomotive broke. We held that the jury was properly instructed on the issue of causation where instructions clearly limited the award of damages to damages for injuries proximately caused by the accident. *Callihan*, 654 P.2d at 975. In the instant case, Court Instruction No. 7 stated:

> In this case, Plaintiff seeks damages under a law of the United States commonly called the Federal Boiler Inspection Act. It has been determined by

this Court that on February 28, 1978, at the time of the fall for which Jack Anderson seeks to recover, the Defendant, Burlington Northern, Inc., was in violation of the Federal Boiler Inspection Act, by reason of the presence of a piece of metal pilot in the entry way to the toilet compartment of Burlington Northern locomotive number 1820.

Therefore, the only issues for your consideration are:

(1) Whether Plaintiff was injured as a result of the accident occurring on February 28, 1978; and

(2) The amount of damages, if any, Plaintiff is entitled to receive for any injuries which you may find were caused by the accident of February 28, 1978.

Court Instruction No. 12 instructed the jury similarly. As such, the jury was not improperly instructed on the issue of causation.

III

Appellant specifies that the District Court erred in not disqualifying juror Dailey upon challenge for cause. We adhere to the rule that the trial court is in a better position to judge the prejudice of jurors and its findings and its decision will not be set aside unless the error is manifest or there is a clear abuse of discretion. *Liss v. Krejtel* (1973), 162 Mont. 144, 147, 509 P.2d 841, 843. The rule is the same where there has been the forced use of a peremptory challenge. *Abernathy v. Eline Oil Field Services, Inc.* (1982), 650 P.2d 772, 777, 39 St.Rep. 1688, 1696.

Here, during appellant's voir dire of prospective juror Dailey, Dailey revealed that he is a grain farmer that utilizes BN yearly to ship his grain. He stated that he felt BN was grossly overcharging for its services. Appellant challenged the juror for cause. The trial judge then questioned Dailey to determine if he held any feelings of animosity toward BN that would preclude him

from awarding damages fairly. Daily denied any such animosity, and the judge denied the challenge. While we think it may have been best to dismiss Dailey because other jurors were readily available, we can see no abuse of discretion.

IV

BN contends that the trial court erred in failing to instruct the jury on the nontaxability of any award made by the jury. We recently considered the same argument in *Dallas v. Burlington Northern, Inc.* (Mont. 1984), 689 P.2d 273, 277, 41 St.Rep. 1902, 1908. The Federal Circuit Courts of Appeals are not in agreement on this issue. See *Flanagan v. Burlington Northern, Inc.* (8th Cir.1980), 632 F.2d 880, 889, and *O'Byrne v. St. Louis Southwestern Ry.* (5th Cir.1980), 632 F.2d 1285, 1287. We will adhere to our holding in *Dallas*, 689 P.2d at 278, that in a case where the jury awards the exact amount of damages projected by the economist any error in failing to give a nontaxability instruction is harmless. This holding was based on the rationale that the jury clearly did not award a sum for some future tax obligation.

In the instant case, the jury awarded $195,000, or $45,000 *less* than $240,000 in damages projected by the economist. Therefore, by the rationale in *Dallas*, any error in failing to give the nontaxability instruction is harmless.

Having thus held, we are compelled to comment that in the future it would be better for a trial court to give a nontaxability instruction to the jury. Such an instruction is easily made and would remove any doubt as to whether the jury overcompensated plaintiff on the basis of an erroneous assumption that the judgment will be taxed. We make this comment because of trial courts' reliance on previous holdings by this Court that future income tax liability is an improper consideration in

formulating an award for loss of future earnings. See *Torchia v. Burlington Northern, Inc.* (1977), 174 Mont. 83, 96, 568 P.2d 558, 566; *McGee v. Burlington Northern, Inc.* (1977), 174 Mont. 466, 477, 571 P.2d 784, 791. Those holdings have been overruled by the United States Supreme Court in *Norfolk & Western Ry. v. Liepelt* (1980), 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689. After *Liepelt*, it is proper to give the nontaxability instruction.

V

The medical expenses Anderson incurred for treatment of the injuries he sustained in the February 28, 1978, accident were paid directly by Travelers' Insurance Company; or, they were paid by Burlington Northern and Burlington Northern was reimbursed by Travelers. Prior to trial, Anderson's motion in limine to prohibit BN from showing that BN or Travelers had paid these expenses was granted. BN claims that the trial court erred in excluding this evidence because that evidence shows Anderson incurred no loss for medical expenses related to the accident. The trial court excluded the evidence because the insurance was a collateral source.

The insurance arrangement was under Travelers Group Policy No. GA2300. This policy was obtained pursuant to a health and welfare agreement between participating rail carriers and numerous railway labor organizations, including the Brotherhood of Locomotive Engineers of which appellant is a member. BN argues that evidence of benefits obtained by Anderson through this policy should be admitted because the insurance is not a collateral source. For proof that the insurance is not a collateral source, BN points to the health and welfare agreement which specifically states:

> . . . The parties . . . intend that benefits provided under the policy contract will satisfy any right of recovery against the employing railroad for such

> benefits to the extent of the benefits so provided. Accordingly, —(1) Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

The collateral source rule has been applied in an FELA setting by the federal circuit courts with the only question being whether the insurance is in fact a collateral source. See generally *Patterson v. Norfolk and Western Railway Co.* (6th Cir.1973), 489 F.2d 303; *Blake v. Delaware and Hudson Railway Co.* (2nd Cir. 1973), 484 F.2d 204. Title 45 U.S.C. § 55 of the FELA broadens application of the collateral source rule with respect to the circumstances in the instant case. That statute is as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

The United States District Court for the District of Montana has recently interpreted this statute as it applies to the same health and welfare agreement we are dealing with here in an order issued by Chief Judge Battin in the case of *John L. Herbst v. Burlington Northern Railroad Co.*, CV-84-51-BLG. Judge Battin determined that 45 U.S.C. § 55 allows BN to "set off only

the premiums, not what the premiums bought" and prevents BN "from contracting away the benefits of § 55 as was attempted by the Health and Welfare Agreement between the union and the railroad." As a result, Judge Battin granted Herbst's motion in limine to prevent introduction of medical expenses already paid by BN and its insurance company. We will follow Judge Battin's interpretation of 45 U.S.C. § 55 and hold that the provision of the collective bargaining agreement relied upon by BN is void. Accordingly, the collateral source rule applies to the paid medical expenses, and the trial court properly prevented introduction of evidence as to their payment.

VI

Along with the jury verdict for damages of $195,000, the District Court added a directed verdict of $11,795.25 for medical expenses. However, the District Court's jury Instruction No. 12 states:

> . . . The amount of any award shall include:
>
> 1. The reasonable value of medical care, services and supplies reasonably required and actually given in the treatment of Plaintiff . . .

BN complains that this instruction plus the directed verdict and the insurance paid medical expenses results in triple recovery by Anderson for incurred medical expenses. The point is well taken.

It is reversible error to instruct a jury to include medical expenses in its award and then to add a directed verdict for the same medical expense on top of the jury award.

We therefore affirm the judgment for $195,000 but reverse the directed verdict of $11,795.25.

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 84-485

JACK D. ANDERSON,
Plaintiff and Respondent,

v.

BURLINGTON NORTHERN, INC., a Delaware Corporation,
Defendant and Appellant.

[Filed Dec. 19, 1985]

ORDER

PER CURIAM:

The petition for rehearing is denied.

DATED this 19th day of December, 1985.

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ Frank B. Morrison, Jr.

/s/ Fred J. Weber

/s/ L. C. Gulbrandson

/s/ William E. Hunt
Justices

HON. JACK L. GREEN
District Judge,
sitting in place of Mr.
Justice John C. Sheehy

The Honorable Jack L. Green has advised the Court that he would deny the petition for rehearing.

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 84-485

JACK D. ANDERSON,
Plaintiff-Respondent,

—vs—

BURLINGTON NORTHERN, INC., a Delaware Corporation,
Defendant-Appellant.

ORDER TO EXTEND STAY OF
ENFORCEMENT OF JUDGMENT

Motion having been made and good cause appearing therefor,

IT IS HEREBY ORDERED that the stay against the execution of any proceedings to enforce the judgment in this action is extended pending timely filing and disposition of Defendant-Appellant's petition to the United States Supreme Court for a writ of certiorari and, if granted, ultimate review by the Supreme Court. Defendant's supersedeas bond in the amount of $195,000.00 and undertaking of costs, interest and damages that Plaintiff-Respondent may sustain by reason of this stay, as attached hereto, is approved for filing. The Clerk is ordered to file the same.

DATED this 24 day of December, 1985.

/s/ John Conway Harrison
Supreme Court Justice

[Filed Dec. 24, 1985]

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF CASCADE

No. BDV-179

JACK D. ANDERSON,

Plaintiff,

vs.

BURLINGTON NORTHERN, INC., a Delaware corporation,

Defendant.

JUDGMENT UPON THE DIRECTED VERDICT AND JURY VERDICT

This action came on for a jury trial before the Court commencing June 25, 1984, Honorable John McCarvel presiding. The issues were duly tried and a verdict rendered. The jury verdict found in favor of the Plaintiff, Jack D. Anderson, and against the defendant, Burlington Northern, Inc., a Delaware Corporation, and assessed Plaintiff's damages to be in the sum of ONE HUNDRED NINETY FIVE THOUSAND DOLLARS ($195,000.00). Following the close of the parties' case in chief, the Court granted Plaintiff's motion for a directed verdict as to his claim of incurred medical related expenses to date of trial in the amount of ELEVEN THOUSAND SEVEN HUNDRED NINETY FIVE DOLLARS and TWENTY FIVE CENTS ($11,795.25) and the Court thereby withdrew from the province of the jury that item of claimed damages as a matter of law.

WHEREFORE, by virtue of the law, and by reason of the premises of the aforesaid, it is ordered, adjudged and decreed that Plaintiff have and recover from defendant

the sum of TWO HUNDRED SIX THOUSAND SEVEN HUNDRED HUNDRED [sic] NINETY FIVE DOLLARS and TWENTY FIVE CENTS ($206,795.25) with interest thereon at the rate of ten percent (10%) per annum from the date of the verdict until paid, together with costs and disbursements amount to the sum of $6,093.76.

IT IS FURTHER ORDERED that the Clerk of Court enter the foregoing judgment forthwith and provide notice thereof to all attorneys of record.

DATED this 3rd day of July, 1984.

/s/ John M. McCarvel
District Court Judge

STATUTES

Section 5 of the Federal Employers' Liability Act, 45 U.S.C. § 55 (1982), provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

INSTRUCTION NO. 17

In determining your verdict, you should calculate any past loss of earnings on the basis of his net earnings, i.e., the earnings left to him after the payment of income taxes.

INSTRUCTION NO. 28

Any award you make to plaintiff will not be subject to federal or state income taxes. You should not consider such taxes in arriving at the amount of your award.

COURT JURY INSTRUCTION NO. 12

This Court finds that on February 28, 1978, at the time complained of, the Defendant violated the Federal Boiler Inspection Act as a matter of law and that violation contributed as a proximate cause to the fall complained of by the Plaintiff. If, under the Court's instructions, you find that the Plaintiff was injured as a result of the incident complained of, then you should award Plaintiff damages in an amount that will reasonably compensate him for each of the following elements of claimed loss or harm, provided that you find that it was or will be suffered by him as a result of the fall in which he was involved on February 28, 1978, and which is the subject of this lawsuit. The amount of any award shall include:

1. The reasonable value of medical care, services and supplies reasonably required and actually given in the treatment of the Plaintiff, and the reasonable value of similar items reasonably certain to be required and given in the future.

2. The reasonable value of wages lost to date by Plaintiff since the injury because of being unable to pursue his occupation as a proximate result of the injuries he received. In determining this amount you should consider evidence of his earning capacity, earnings, and the manner in which he ordinarily occupied his time before the injury and find what he was probably certain to have earned during the time so lost, had he not been disabled.

3. Also such sum as will reasonably compensate the Plaintiff for any loss of future earnings or earning power occasioned by the damages in question. Fixing this amount, you may consider what Plaintiff's health, physical ability and earning power were before the accident, and what they are now. You may also consider the nature and extent of his

injuries, and whether or not they are reasonably certain to be permanent. If not, you may consider the extent of their duration. All of these matters are considered in order to determine first, the effect, if any, of his injuries upon his future earning capacity, and second, the present value of any loss so suffered.

4. Reasonable compensation for any physical pain and emotional distress suffered by the Plaintiff from the date of his injury until the date of his trial which was proximately caused by his injuries and for similar suffering, reasonably certain to be experienced in the future from the same cause.

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making any award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

5. If you find that the Plaintiff has been permanently injured or will continue to suffer in the future from his injuries, you may award Plaintiff such sum as will compensate him reasonably for the destruction, if any, of his capacity to pursue an established course of life as an element of damages, distinct from Plaintiff's loss of earning capacity.

EXCERPTS FROM THE TRIAL TRANSCRIPT

[Tr. 403-406]

(WHEREUPON, the following proceedings were held in chambers, and outside the presence of the jury.)

MR. KOOLEN: We have a couple of things this morning, so I asked Connie to bring her machine in so we can put them on the record. I wanted to start off with an offer of proof, so the record may show that counsel is in chambers with the court in order for the defendant to now state for the record an offer of proof with regard to the subject of income tax liability as it may apply to any award that the jury may make in this case.

The defendant, in its trial brief, indicated that the authority from the U. S. Supreme Court, specifically the Leipelt case, held that a jury should be instructed as to the impact of income taxes on any award that they might find in an FELA case.

The plaintiff has resisted that relying on Montana authority, and the court indicated to us yesterday that in this case you are going to follow the Montana authority, specifially [sic] the Tortia case, and there will be no instruction on the subject of income taxes. And in that regard, I needed to make an offer of proof, and place on the record that if I were permitted to do so, I would cross examine the plaintiff's economist, Professor Harry Gaghen, who is going to testify today, and I learn from Mr. Gaghen that he was provided with copies of the plaintiff's income tax returns for the years 1974 through 1982, and that he obtained information from those income tax returns as a basis for his calculations and his economic projections in this particular matter.

I would learn from him that, according to the plaintiff's income tax returns for the year 1974, he had an income tax liability combined federal and state of about $3,000, which comes to approximately 15 percent of his earnings that year. In 1975, his income tax liability,

both federal and state, was approximately $3,600, for a total of about 17 percent for that year.

Rather than go through each and every year, finally in the year 1982, the plaintiff's income tax returns would show that he paid taxes, both federal and state, of approximately $7,000, which places him in a bracket of about 19 percent.

Therefore, I would be able to prove, through the economist witness, Mr. Gaghen, that the plaintiff's income tax returns show that his past wages have been taxed at an average rate of 17 percent.

Subsequently, when the jury considers the appropriate amount to compensate the plaintiff for his past wage loss, they should consider reducing that amount by 17 percent in order to take into effect—take into account the impact of state and federal income taxes.

Likewise, that would apply to any amount they might award for future damages, since we could reasonably expect that if he were to earn those wages, instead of having them awarded to him, they would be likewise taxed at an appropriate or average rate of about 17 percent. That concludes my offer of proof.

THE COURT: Do you want to respond to that?

MR. HALVERSON: Our response is simply that the controlling authority in the State of Montana is expressed in Tortia v. BN, and McGee v. BN.

THE COURT: Do you have a citation of those cases?

MR. HALVERSON: I would have to go out and get those. They were cited in our trial memorandum.

THE COURT: That's all right. They were 1977 cases, were they?

MR. HALVERSON: Right. And also in the Eighth Judicial District, which we are in now, the case that Mr. Koolen is referring to, the Leipelt case, the case was entitled Dallas v. BN, which was also tried following the holding of the Leipelt case, and the Eighth Judicial District likewise did not follow the Leipelt decision, but relied on Tortia and McGee, and held that

income tax considerations were improper in an award of damages in the state under the FELA.

THE COURT: Okay. The court's ruling will be it's going to follow the Montana cases, and particularly the Tortia case in prohibiting the introduction of cross examination of the economist with reference to the impact, and any income tax liability from any award made to the plaintiff.

* * * *

[Tr. 654-656]

(WHEREUPON, the following proceedings were held in chambers, and outside the presence of the jury.)

THE COURT: Okay. The record will show that the Court is giving Instructions 1 through 24, and all of the other instructions submitted by either party are denied. All right. Court's 1, of course, is a preliminary instruction I gave earlier. Court's 2 is Defendant's 1, less that first page. Court's 3 is Defendant's 2.

MR. HALVERSON: Excuse me, Court's 2 was which one?

THE COURT: Court's 2 is Defendant's 1 less the first page.

MR. HALVERSON: Thank you.

THE COURT: Court's 3 is Defendant's 2. Court's 4 is Defendant's 3, Court's 5 is Defendant's 5, Court's 6 is Plaintiff's 5, Court's 7 is Plaintiff's 7, Court's 8 is Plaintiff's 8.

The Court's 9 is Plaintiff's 9, Court's 10 is Plaintiff's 11, Court's 11 is Plaintiff's 12, Court's 13 is Defendant's 16—wait a minute—what did I say? The Court's 11 is Plaintiff's 12.

MR. KOOLEN: Right.

THE COURT: And the Court's 12 is Plaintiff's 13, Court's 13 is Defendant's 16, Court's 14 is Defendant's 18, Court's 15 is Plaintiff's 14, Court's 16 is Defendant's 20.

The Court's 17 is Defendant's 22, Court's 18 is Plaintiff's 16, Court's 19 is Plaintiff's 18, Court's 20 is Plain-

tiff's 19, the Court's 21 is Plaintiff's 30A, and I will give you a copy of that. The Court's 22 is Plaintiff's 15, the Court's 23 is Plaintiff's 20, and the Court's 24 is Plaintiff's 17. The record will show that each side is permitted 50 minutes' final argument.

* * * *

[Attachment to Defendant's Brief in Opposition to Plaintiff's Motion *In Limine*]

HEALTH AND WELFARE AGREEMENT

THIS AGREEMENT, made this 22nd day of October 1975 by and between the participating carriers listed in Exhibit A, attached hereto and hereby made a part hereof, and represented by the National Carriers' Conference Committee, and the employees of such carriers shown thereon and represented by the Railway Labor Organizations signatory hereto, witnesseth:

WHEREAS earlier in 1975 certain agreements were reached between the railroads parties thereto, as represented by the National Carriers' Conference Committee, and the employees respectively covered thereby as represented by certain of the Railway Labor Organizations signatory hereto, and

WHEREAS such railroads and the remaining Railway Labor Organizations signatory hereto are in agreement with respect to the provisions of such agreements which relate to health and welfare benefits,

IT IS AGREED:

ARTICLE I—IMPLEMENTATION OF THE FOLLOWING PROVISIONS OF THIS AGREEMENT

The Joint Policyholder Committee created by Article I of the Agreement of January 11, 1968 will continue discussions with The Travelers Insurance Company with a view toward negotiation of amendments to Group Policy Contract GA-23000, extension of such policy contract as amended, and effectuation without undue delay of the prior agreement by the parties to this Agreement—

"in principle to adoption of a premium-plus-account approach to funding GA-23000, provided that further thorough exploration confirms the advice given us that the interests of the Policyholder will not be adversely affected,"

to the end that (except as set forth in the following Articles of this Agreement) the benefits currently provided by the policy contract may continue to be provided, under the eligibility provisions currently in effect, for the period through December 31, 1977, the railroads to pay the cost of providing such benefits offset by such amounts as may be available from the Special Account.

ARTICLE II—AMENDMENT OF GROUP POLICY CONTRACT GA-23000 RELATING TO HUSBAND-AND-WIFE TEAMS

The Joint Policyholder Committee will negotiate with the Insurer to amend Group Policy Contract GA-23000 to the end that in situations in which both husband and wife work for railroads and are covered by the Policy Contract, in place of the present provision under which both may be covered for employee benefits only, a coordination of benefits approach will apply, with proper safeguards for hospital association arrangements. The intention of this provision is to treat the husband and wife team as if one worked for an employer other than a railroad. Attachment 1 hereto sets forth in detail the principles involved. This amendment is to be effective September 1, 1975.

ARTICLE III—LIABILITY CASES

Section A. Employees of Non-Hospital Association Railroads

In case of an injury or a sickness for which an employee who is eligible for employee benefits under Group Policy Contract GA-23000 and may have a right of re-

covery against either the employing railroad or a third party tort-feasor (a party who has committed a wrongful act), or both, benefits will be provided under the policy contract subject to the provisions hereinafter set forth. The parties hereto do not intend that benefits provided under the policy contract will duplicate, in whole or in part, any amount recovered from either the employing railroad or a third party tort-feasor for hospital, surgical, medical or related expenses of any kind specified in the policy contract, and they intend that benefits provided under the policy contract will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits so provided. Accordingly,—

(1) Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

(2) On any recovery from any tort-feasor other than the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract, the employee will reimburse the Insurer from such recovery for any benefits paid under the policy contract. Except in a case involving an on-duty injury, the Insurer will be subrogated to any right of recovery the employee may have against any tort-feasor other than the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

Section B. Dependents of Employees of Hospital Association and Non-Hospital Association Railroads

The same principles and provisions as are spelled out in Section A of this Article III with respect to third

party tort-feasors apply to Dependents (on both hospital association and non-hospital association railroads) as to Employees.

Section C. Employees of Hospital Association Railroads

With respect to offsets by a hospital association railroad against any right of recovery the employee may have against the railroad, the principles set forth in Section A of this Article III apply.

Section D. Amendment of Group Policy Contract GA-23000

The Joint Policyholder Committee will negotiate with the Insurer to amend Group Policy Contract GA-23000 to include the third party tort-feasor subrogation provisions in Paragraph 2 of Section A of this Article III, with the understanding that such provisions will be exercised only when practicable.

Section E. Employee Booklet

The Insurer will be requested to include in the employee certification and information booklet a statement setting forth the intent of Sections A, B and C of this Article III insofar as they relate to the employing railroad, as well as such statement as may be appropriate in relation to the third party tort-feasor subrogation provisions.

ARTICLE IV—EFFECT OF THIS AGREEMENT

This Agreement is in implementation of the agreement provisions referred to in the preamble hereof, and shall remain in effect through December 31, 1977 and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

SIGNED AT WASHINGTON, D. C., THIS 22nd DAY OF OCTOBER, 1975.

FOR THE PARTICIPATING CARRIERS LISTED IN EXHIBIT A:

/s/
Chairman

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

HEALTH AND WELFARE COMMITTEE, COOPERATING RAILWAY LABOR ORGANIZATIONS:

/s/
Chairman

RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO:

/s/
President

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS:

/s/
International President

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS:

/s/
International Vice President

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA:

/s/
General President

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS:

/s/
President

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS:

/s/
General Vice President

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION:

/s/
General Vice President

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYERS:

/s/
International President

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES:

/s/
President

BROTHERHOOD OF RAILROAD SIGNALMEN:

/s/
President

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION:

/s/
Vice President

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION:

/s/
National President

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION:

/s/
International Representative

UNITED TRANSPORTATION UNION:

/s/
President

BROTHERHOOD OF LOCOMOTIVE ENGINEERS:

/s/
President

AMERICAN TRAIN DISPATCHERS ASSOCIATION:

/s/
President

RAILROAD YARDMASTERS OF AMERICA:

/s/
Grand President

AMERICAN RAILWAY SUPERVISORS ASSOCIATION:

/s/
Grand President

BROTHERHOOD OF SLEEPING CAR PORTERS:

/s/
International President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV-84-51-BLG

JOHN L. HERBST,

Plaintiff,

—vs—

BURLINGTON NORTHERN RAILROAD COMPANY,
a corporation,

Defendant.

[Filed Apr. 22, 1985]

ORDER

This case is before the Court on plaintiff's and defendant's motions in limine. For the reasons stated below, the plaintiff's motion is granted and the defendant's motion is denied.

DISCUSSION

Plaintiff seeks an order preventing introduction of evidence pertaining to the payment of plaintiff's medical expenses by defendant or its insurance company. Defendant objects to plaintiff's motion and moves for an order preventing introduction of evidence pertaining to medical expenses incurred by plaintiff.

The collateral source rule has been applied in the FELA setting by the appellate courts with the only question being whether the insurance is in fact a collateral source. *See* generally *Patterson v. Norfolk and Western*

Railway, 489 F.2d 303 (6th Cir. 1973); *Blake v. Delaware and Hudson Railway Co.*, 484 F.2d 204 (2d Cir. 1973).

The collateral source rule has been codified in the FELA setting, the effect of which is to further broaden what is determined to be a collateral source. Not only is it true "that the employer-tortfeasor is not entitled to mitigate damages by setting off compensation received by the employee from an independent source," *Blake*, 484 F.2d at 206 citing *Haughton v. Blackships, Inc.*, 472 F.2d 788, 790 (5th Cir. 1972), but "under 45 U.S.C. § 55 the railroad is entitled to set off only the premiums, not what the premiums bought" when the railroad's own insurance supplies the benefits to the employee. *Blake*, 489 F.2d at 207 (Judge Friendly's concurrence). Furthermore, 45 U.S.C. § 55 prevents the railroad from contracting away the benefits of § 55 as was attempted by the Health and Welfare Agreement between the union and the railroad. Therefore,

IT IS ORDERED that plaintiff's motion in limine is granted and defendant's motion in limine is denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 22nd day of April, 1985.

/s/ James F. Battin
Chief Judge

Not To Be Published In Official Reports

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

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1 Civil No. 40048
(Sup. Ct. No. 674 956)

SEVERIANO V. LOPEZ,
Plaintiff and Respondent,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant and Appellant.

Plaintiff-respondent Severiano Lopez commenced this action against appellant Southern Pacific Transportation Company pursuant to the Federal Employers' Liability Act, 45 U.S.C., § 51 et seq. (hereinafter referred tc as FELA). The answer set up the affirmative defense that Southern Pacific had paid certain disability benefits to Lopez and that the railroad should be entitled to offset the benefits paid against any judgment rendered in Lopez' behalf.

At the commencement of trial, the parties agreed to have the court decide the offset issue at the conclusion of the case. The jury returned a verdict for Lopez in the sum of $45,000. The following week, the court conducted a hearing on the offset issue and ruled that Southern Pacific was not entitled to offset the benefits paid to Lopez against the judgment.

A notice of appeal was filed from the judgment and the order of the trial court denying Southern Pacific's

claim for an offset against the judgment. Thereafter, the parties agreed that Southern Pacific would satisfy that portion of the judgment in excess of the claimed offset and that this appeal by Southern Pacific would be limited to the order denying the offset.

Plaintiff-respondent Severiano Lopez is a railroad maintenance of way worker employed by Southern Pacific. On February 25, 1974, he was injured when he tripped and fell at Southern Pacific's railroad yard located at Indio, California. As a result of the fall, plaintiff suffered injuries to his back. During his period of recovery, plaintiff received $3,276 in insurance benefits from the Benefit Trust Life Insurance. These benefits were received as a result of a nationwide collective bargaining agreement between plaintiff's bargaining agent, the Brotherhood of Maintenance of Way Employees, and the National Carriers' Conference Committee, which represents the country's railroads at the bargaining table. The terms of this agreement, embodied in Maintenance of Way Employees' Supplemental Sickness Benefit Agreement, dated May 15, 1973, allowed eligible maintenance of way employees to receive certain specified benefits while off work. Provision 6 of the agreement, which deals with liability cases, however, provided that any benefits received by the employee were to be offset against any judgment or damages subsequently awarded to the employee.[1] After the agreement was entered into,

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[1] Provision 6 of the agreement states:

"6. *Liability Cases.* In case of a disability for which the employee may have a right of recovery against either the employing railroad or a third party, or both, benefits will be paid under this Plan pending final resolution of the matter so that the employee will not be exclusively dependent upon his sickness benefits under the Railroad Unemployment Insurance Act. However, the parties hereto do not intend that benefits under this Plan will duplicate, in whole or in part, any amount recovered for loss of wages from either the employing railroad or a third party, and they intend that benefits paid under this Plan will satisfy any right of recovery

the union and Southern Pacific selected Benefit Trust Life Insurance Company to administer the plan, designated Group Contract 7000.

Following Lopez' injury, he applied for and received $3,276 in Group Contract 7000 Disability Payments from Benefit Trust Life Insurance.

The sole issue on appeal is whether Southern Pacific is entitled to offset the $3,276 paid to Lopez under the Group Contract 7000 Disability Insurance Policy against the $45,000 judgment rendered against the railroad.

Lopez contends that the disability benefits received fall within the collateral source rule[2] and, as such, the railroad is not entitled to offset the benefits paid to him by the insuarnce company. (Russo v. Matson Navigation

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for loss of wages against the employing railroad to the extent of the benefits so paid. Accordingly, benefits paid under this Plan will be offset against any right of recovery for loss of wages the employee may have against the employing railroad; the employing railroad, or the insuring agent if one is involved, will be subrogated to any right of recovery for loss of wages the employee may have against any party other than the employing railroad; as a condition to paying any benefits under this Plan the employing railroad, or the insuring agent if one is involved, may require the employee to assign to it any such recovery or right thereto from any party other than the employing railroad to the extent that benefits are payable under this Plan; and on any recovery for loss of wages from any party other than the employing railroad, the employee will reimburse the employing railroad, or the insuring agent if one is involved, from such recovery for any benefits paid under this Plan. For purposes of this Paragraph, a recovery which does not specify the matters covered thereby shall be deemed to include a recovery for loss of wages to the extent of any actual wage loss due to the disability involved."

[2] The collateral source rule provides that a tortfeasor cannot reduce the amount of his liability upon a judgment for an injured plaintiff by reason of compensation or insurance proceeds paid to the plaintiff from a collateral source independent of the tortfeasor. (Hall v. Minnesota Transfer Railway Company, 322 F.Supp. 92, 94-95.)

Company, 486 F.2d 1018; United States v. Price, 288 F.2d 448, 449.) Thus, the issue presented is whether the benefits received by Lopez come from a collateral source. Application of this rule depends upon the character of the benefits received. (Hall v. Minnesota Transfer Railway Company, 322 F.Supp. 92, 95.) The mere fact that the employer-tortfeasor has contributed money to the fund by payment of premiums does not establish that such fund may not be a collateral source. If the premiums are contributed by the employer as a result of a contract between the employer and union and payment to the employee is in the nature of a fringe benefit or deferred compensation, then it has been held that the employer should not be entitled to benefit by setting off income in mitigation of his responsibilities as a tortfeasor. (Haughton v. Blackships, Inc., 462 F.2d 788, 791.) If, on the other hand, an employer-tortfeasor voluntarily undertakes to indemnify itself against liability by purchasing a policy, plaintiffs should not be allowed recovery of these benefits as well as his full measure of damages. (Haughton, *supra*, at p. 791.)

On the basis of the foregoing, we conclude that this policy is a fringe benefit maintained by the employer for services rendered to the employees. This policy arose out of collective bargaining between the union and representatives of the railroads. One of the purposes of the policy was to insure that disabled employees are not exclusively dependent upon their sickness benefits under the Railroad Unemployment Insurance Act while awaiting final resolution of a suit against the railroad or a third party. Furthermore, the policy provides benefits to employees who sustain "*accidental bodily injury* which occurred or a *sickness* which commenced while the employee was insured." Eligibility is not dependent on the disability occurring in the course of employment or as a result of employer negligence. In view of these facts, we categorize these benefits as arising from a collateral source.

Southern Pacific disputes this conclusion by arguing that the contract expressly provided under provision 6 that benefits received in cases of the railroad's or a third party's negligence are to be offset against any judgment rendered. The merit of this contention turns on the validity of this offset provision.

Under 45 U.S.C., section 55: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." Under this section it is clear that if the railroad is entitled to reimbursement at all, it is only to the extent of the premiums that were paid by them, *not* the benefits received by plaintiff from the insurance company. (See Blake v. Delaware and Hudson Railway Company, 484 F.2d 204, 207; Russo v. Matson Navigation Company, *supra*, 486 F.2d 1018.)

The railroad maintains that it is not attempting to exempt itself from liability by provision 6, but only seeking to prevent Lopez from receiving a double recovery. In so arguing, it relies on *Thomas v. Penn Central Company*, 379 F.Supp. 24. In *Thomas*, the collective bargaining agreement provided that the railroad "will transmit to The Travelers Insurance Company *81 cents per 'Qualifying Employee' per month as premium for the insurance benefit payments resulting from on-duty injuries.* The amounts so transmitted are not considered as wage equivalents; separate experience rating of benefits payable by reason of on-duty injuries will be main-

tained; any retroactive premium credit based on such separate experience rating will be separately determined and will be held in the Special Account *as a separate fund to be applied to the cost of insurance benefits payable as a result of on-duty injuries.*" (*Id.*, at p. 27; emphasis added.) Plaintiff Thomas sustained an on-duty injury and in a subsequent FELA action he received a verdict in the amount of $47,134. The railroad paid this judgment with the exception of $3,374.80 that it had paid to various hospitals, doctors and creditors of Thomas for medical expenses after the verdict. Thomas then brought suit asking for a complete satisfaction of the judgment. Thomas maintained that he was entitled to the entire amount of the judgment as the railroad would be reimbursed from The Travelers Insurance Company. The court denied Thomas a right to reimbursement under both the collateral source rule and 45 U.S.C., section 55, because the railroad had specifically purchased the policy in order to protect itself against liability. The court stated: "[W]here the railroad has made payments on account of *on-duty injuries and has merely been reimbursed by an insurance policy which it has purchased for that purpose*, such a policy cannot be a prohibitive device intended by the carrier 'to exempt itself from any liability'; rather, it is a method of obtaining funds to pay such liability and would thus not fall within the prohibition of the Statute." (*Id.*, at p. 27; emphasis added.)

Southern Pacific's reliance on *Thomas* is unwarranted as the contractual provision in this case differs significantly from that in *Thomas*. There is no evidence in the present case that the railroad paid the premiums of this disability policy for the purpose of obtaining funds to pay any potential liability for negligence. Furthermore, Congress has specifically limited any setoff in a FELA judgment to the *amount of the premium paid on the employee's policy*. (See Blake v. Delaware and Hudson

Railway Company, *supra*, 484 F.2d 204, at p. 207; Russo v. Matson Navigation Company, *supra*, 486 F.2d 1018.)

As provision 6 does not heed the express prohibition of 45 U.S.C., section 55, the trial court did not err in denying the railroad the right to set off any of the benefits received by Lopez from the insurance company.

In conclusion, we reiterate that while 45 U.S.C., section 55 may at times permit a double recovery, it never imposes a double burden. (Russo, *supra*, at p. 1021.) The tortfeasor here, Southern Pacific, bears only its single burden of $45,000 for its negligence.

The judgment is affirmed.

CALDECOTT, P. J.

We concur:

RATTIGAN, J.

CHRISTIAN, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No. H 79-13

JESUS DIAZ,

Plaintiff,

v.

INDIANA HARBOR BELT RAILROAD COMPANY,

Defendant.

[Filed Dec. 1, 1981]

MEMORANDUM OF DECISION AND ORDER

This cause is now before the Court on a motion for partial summary judgment filed by the defendant on June 25, 1981 pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.[1] The plaintiff has filed a response[2] to the motions, and the issues presented therein have been fully briefed by the parties. For the reasons which follow, the defendant's motion for partial summary judgment will be GRANTED.

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[1] On September 22, 1981 the defendant filed a Motion in Limine which reiterates the issues presented in the Rule 56 motion. For the sake of analysis, however, said motions will be considered together and the Order herein will be dispositive as to both.

[2] On October 26, 1981 the plaintiff filed a "Motion to Strike" which the Court deems as constituting a "response" to a motion for partial summary judgment, as provided pursuant to Local Rule 7(b) and Rule 56(e) of the Federal Rules of Civil Procedure.

Background

The plaintiff, Jesus Diaz, commenced this cause of action on January 12, 1979. By his complaint, the plaintiff seeks money damages for personal injuries allegedly incurred due to the negligence of his employer, defendant, Indiana Harbor Belt Railroad Co.[3] The cause of action is brought pursuant to the Federal Employees' Liability Act, 45 U.S.C. § 51 *et seq.* (hereinafter "FELA" or "the Act").

Issue Presented

By its current motion, the defendant argues that, as a matter of law, the plaintiff is barred from seeking damages for medical bills which have been paid by Travelers Insurance Company under Group Policy GA23000. That policy, issued and maintained pursuant to a Health and Welfare Agreement between many railroads, including the defendant, and the collective bargaining representatives of their employees, covers hospital and medical expenses of the insured employees, including plaintiff, and of their dependents. The premiums on the policy are paid by the several railroads.

Article III, Section A(1) of the Health and Welfare Agreement provides as follows:

> In case of an injury or a sickness for which an employee who is eligible for employee benefits under Group Policy Contract GA-23000 and may have a right of recovery against either the employing rail-

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[3] On or about September 24, 1976, the plaintiff was employed by the defendant as a track laborer. On said date, while acting in the scope of his employment, the plaintiff stepped down from an engine onto the right-of-way. In doing so, the plaintiff struck his right foot against a rock which was hidden by tall weeds and grass. This rock caused the plaintiff to twist and injure his right ankle, which eventually rendered him disabled and required corrective surgery. It is alleged that the defendant's negligence in not properly maintaining its right-of-way was the proximate cause of the plaintiff's injury.

road or a third party tort-feasor (a party who has committed a wrongful act), or both, benefits will be provided under the policy contract subject to the provisions hereinafter set forth. The parties hereto do not intend that benefits provided under the policy contract will duplicate, in whole or in part, any amount recovered from either the employing railroad or a third party tort-feasor for hospital, surgical, medical or related expenses of any kind specified in the policy contract, and they intend that benefits provided under the policy contract will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits so provided. Accordingly,

> (1) Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

The defendant asserts that the language of the Agreement now bars the plaintiff's claim for medical bills. The plaintiff, in response, asserts that the subject insurance policy constituted a "fringe benefit" to the plaintiff and, as such, is a "collateral source" of recovery against which the defendant may not set-off the amount of premiums paid or benefits received thereunder by the employees.

Discussion

Issues relating to the measure of damages in FELA actions are governed by Section 5 of the Act, 45 U.S.C. § 55, which reads as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent

> be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Generally, in FELA cases like the one at bar, federal practice has been to determine whether a particular benefit falls within Section 5; if it does not, the 'collateral source rule' is invoked and mitigation is denied. *See Blake v. Delaware and Hudson Railway Company*, 484 F.2d 204 (2nd 1973); *Lucht v. Chesapeake & O. Ry. Co.*, 489 F. Supp. 189 (W.D.Mich. 1980); *Urbaniak v. Erie Lackawanna Ry. Co.*, 424 F. Supp. 981 (W.D.N.Y. 1977); *Hall v. Minnesota Transfer Railway Company*, 322 F. Supp. 92 (D.Minn. 1971). However, blanket application of the FELA's codified collateral source rule has come under judicial criticism. In a concurring opinion in the *Blake* case, *supra* at 207, Judge Friendly stated:

> Permitting Blake to recover from the railroad the bulk of his hospital bills, which were paid by the railroad and not by him, seems to be shockingly unjust.
>
> * * * *
>
> If the railroads wish to avoid the harsh result reached by the district court, they can accomplish this by specific provision in the collective bargaining agreement.

The defendant represents to this Court that Article III, Section A of the subject Health and Welfare Agreement is the kind of "specific provision" referred to by Judge Friendly that would prevent the application of the

seemingly harsh collateral source rule. To this argument the plaintiff makes no refutation.[4]

After having thoroughly examined the pleadings, motions, exhibits, affidavits and memorandums submitted herein, the Court finds that the defendant's argument is well-taken, and that the defendant is entitled to a credit for payments received by the plaintiff under Group Policy GA23000. *See Thomas v. Penn Central Company*, 379 F.Supp. 24 (W.D.Pa. 1974); *Nelson v. Penn Central R.R. Co.*, 415 F.Supp. 225 (S.D.Ohio 1976); *Rogers v. Chicago and Northwestern Transportation Company*, 375 N.E.2d 852 (Ill.App. 1978). *Cf. Urbaniak, supra* at 984 (court felt constrained to follow *Blake* after finding no "specific provision" in the collective bargaining agreement before it).

ORDER

Accordingly, it is ORDERED that the defendant's motion for partial summary judgment be GRANTED as to the plaintiff's claim for medical expenses; it is further

ORDERED that the defendant's motion in limine be GRANTED so as to preclude the plaintiff from offering evidence of medical expenses at the trial of the above-entitled cause of action.

Entered this 1st day of December, 1981.

/s/ James T. Moody
Magistrate
United States District Court

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[4] The plaintiff's Response Memorandum and "Motion to Strike" focuses on the provisions of Group Policy GA23000 rather than on the provisions of the Agreement. Essentially, the plaintiff argues that anytime Group Policy GA23000 appears in an FELA case, it "should be given the same treatment" as in prior cases; despite the fact that those cases did not involve a "specific" collective bargaining agreement provision which acts to the contrary.